

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
XINUOS, INC.,

4 Plaintiff,

5 -against-

22-cv-09777  
BENCH RULING

6 INTERNATIONAL BUSINESS MACHINES CORPORATION et al.,

7 Defendant.  
8 -----x

9 United States Courthouse  
White Plains, New York

10 January 22, 2024

11 B e f o r e :

12 HONORABLE JUDGE CATHY SEIBEL,  
13 United States District Judge

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Official Court Reporter (914)390-4242



1 MR. SNYDER: I have a habit of creating names you  
2 can't pronounce.

3 THE COURT: Well, let me tell you where we come out.  
4 You're going to want to order the transcript because I'm going  
5 to lead with the punch line. The motion is going to be granted  
6 in part and denied in part -- or motions I should say. So  
7 there's a partial motion for summary judgment and a motion to  
8 dismiss by defendants IBM and Red Hat. The motion for summary  
9 judgment relates to Xinuos's copyright infringement claim  
10 against IBM, and the motion to dismiss relates to Xinuos's  
11 claims against IBM and Red Hat for violation of Sections 1  
12 and 2 of the Sherman Act, Section 7 of the Clayton Act and the  
13 Virginia Islands Antimonopoly Law and unfair competition and  
14 unjust enrichment under Virgin Islands' common law.

15 Let me start with the facts related to defendant's  
16 motion for summary judgment. I base these facts on defendant's  
17 Local Civil Rule 56.1 statement, which is ECF Number 123, the  
18 plaintiff's responsive statement, which is ECF Number 128, and  
19 the supporting materials.

20 Plaintiff's responsive 56.1 statement also includes a  
21 126-paragraph additional statement of facts. That's at page 37  
22 to 64, ECF128. Local Rule 56.1 allows for a counterstatement  
23 of, quote, additional material facts as to which it is  
24 contended that there exists a genuine issue to be tried,  
25 unquote. That's Rule 56.1(b), but there's no provision for a

1 responsive 56.1 statement to include additional facts that are  
2 not in dispute but that a party opposing summary judgment  
3 simply thinks are important. Any additional facts have to be  
4 confined to the material facts in dispute.

5 Because plaintiff's so-called additional statement  
6 consists of facts that plaintiff regards as undisputed and  
7 helpful, it is not authorized, and I do not consider it. I  
8 also do not consider defendant's response to it, which is ECF  
9 131 at 68 to 119.

10 Defendants, for their part, filed a reply to  
11 plaintiff's response to defendant's 56.1, and that was pages 1  
12 through 67 of ECF 131, supporting anew their original 56.1  
13 statement by addressing each of plaintiff's responses and  
14 opining on whether he created a genuine issue of fact. Local  
15 Rule 56.1 does not permit the filing of reply 56.1 statements.  
16 See, for example, *Capital Records against Vimeo*, 2018 Westlaw  
17 4659475 at page 1, Southern District, September 10, 2018.

18 A reply 56.1 statement is, quote, a procedurally  
19 improper attempt to have the last word in a manner that is not  
20 contemplated by the local rules, unquote. *Killis v. Cabela's*,  
21 2015 Westlaw 128098 at page 1, Northern District of Illinois,  
22 January 8, 2015. That's a district with rules substantively  
23 similar to ours. See also *Pape v. Dirkson*, 2019 Westlaw  
24 1435882 at pages 2 to 3, Eastern District, February 1, 2019,  
25 report and recommendation adopted, 2019 Westlaw 1441125,

1 March 31, 2019.

2 So I don't consider the reply 56.1 statement either.  
3 See *Lincoln National v. TCF*, 875 F. Supp. 2d 817 at 820, Note  
4 1, Northern District of Illinois, 2012. Both sides overreaches  
5 appear to be efforts to get around the Court's page limitations  
6 for briefs by making arguments in 56.1 statements, which are  
7 supposed to be limited to facts. Those page limitations exist  
8 for a reason, and I expect both sides to abide by them going  
9 forward.

10 So the following disputes -- the following facts are  
11 undisputed unless otherwise noted. IBM is a New York  
12 corporation that creates operating system software for servers  
13 and sells a Unix-based server operating system called AIX for  
14 Power among other products. Xinuos, formerly named -- I'm  
15 going to spell it. U-N, capital X, I-S, Inc. -- is a Virgin  
16 Islands corporation -- a U.S. Virgin Islands corporation formed  
17 in 2009.

18 Project Monterey, which I may abbreviate PM at times,  
19 was a joint development project between IBM and The Santa Cruz  
20 Operation, Inc. That's in defendant's 56.1, paragraph 3.  
21 Plaintiff attempts to dispute it by saying it fails to include  
22 relevant information and is misleading because Project Monterey  
23 also included Sequent and Intel. This purported dispute and  
24 many of plaintiff's others, quote, improperly interjects  
25 argument and/or immaterial facts in response to facts asserted

1 by defendants, often speaking past defendants' asserted facts  
2 without specifically controverting those facts, unquote. *Baity*  
3 *v. Kralik*, 51 F. Supp. 3d 414 and 418, Southern District, 2014.  
4 See, for example, plaintiff's response to paragraphs 5, 7, 19  
5 through 21, 26, 32, and 50 to 57. Plaintiff's response  
6 contains several similar purported denials that do not actually  
7 deny or refute the facts asserted by defendants but instead  
8 quibble with phraseology. See, for example, paragraphs 13, 14,  
9 16, 17, 22, 31, 36, 40, 87, and 90 through 92.

10 In these circumstance where the record supports  
11 defendants contentions, I deem defendant's facts admitted. See  
12 *Warren v. Ewanciw*, 2019 Westlaw 589488 at page 2, Note 4,  
13 Southern District, February 13, 2019.

14 So I accept that IBM and Santa Cruz worked together  
15 on Project Monterey. It was governed -- Project Monterey was  
16 joined -- sorry. Project Monterey was governed by a joint  
17 development agreement, which I'll call the JDA, into which IBM  
18 and Santa Cruz entered on October 23, 1998. Plaintiff points  
19 out that it was signed on October 26, although dated  
20 October 23. This dispute is immaterial.

21 The purpose of Project Monterey was to develop and  
22 market Unix-like operating system products, including a  
23 Monterey/64 version for the then forthcoming IA-64 Intel  
24 processor, a version to run on IBM's proprietary Power  
25 processor architecture and a version to run on the IA-32

1 architecture. When Project Monterey began, the IA-64  
2 architecture had not been commercialized but was under  
3 development in a separate collaboration between Intel and  
4 Hewlett-Packard. Under the JDA, Santa Cruz and IBM agreed to  
5 provide resources and technology to create a compatible family  
6 of products and agreed to grant each other licenses to use code  
7 supplied during the project. They also agreed under Section  
8 22.3 of the JDA that any legal action related to a breach of  
9 the JDA had to be commenced no later than two years from the  
10 date of the breach.

11 The JDA also provided that if Project Monterey was  
12 terminated, quote, licenses and sublicenses to end users  
13 granted by either party prior to the effective date of  
14 termination are irrevocable and shall survive the termination  
15 or expiration of the agreement, unquote. See paragraph 9 of  
16 the 56.1.

17 The defendant contends that that provision means that  
18 any rights afforded to IBM during Project Monterey for use of  
19 UnixWare source code would not end after the termination of the  
20 project or the JDA. Plaintiff disputes this fact as false and  
21 misleading because IBM was not an end user. IBM incorporated  
22 code for Project Monterey into IBM products, which IBM contends  
23 it and Santa Cruz intended from the beginning. See paragraph  
24 10. Plaintiff disputes this fact as false and misleading  
25 because Supplement B to the JDA limited the license such that

1 IBM was permitted to use Santa Cruz's code only for joint  
2 development of an IA-64 product, and if the JDA was terminated,  
3 the parties could only continue to use licensed materials for  
4 the development of the, quote, IA-64 product release run,  
5 unquote, which plaintiff contends never occurred.

6 Plaintiff also points to a related litigation in Utah  
7 where the Tenth Circuit found a question of fact as to whether  
8 the release entitled IBM to a royalty-free license of Santa  
9 Cruz's code. See plaintiff's paragraph 10 citing *SCO Group v.*  
10 *IBM*, 879 F.3d 1062 at 1072, Tenth Circuit, 2018.

11 Santa Cruz was aware that IBM used the code as early  
12 as August 2000 and no later than May of 2001 when IBM released  
13 software, and IBM and Santa Cruz jointly announced that the  
14 software incorporated Santa Cruz's technology. Paragraph 11.  
15 Plaintiff disputes this fact as misleading to the extent it  
16 suggests that the company was aware of any copyright  
17 infringement or that IBM was using the code outside the scope  
18 of Project Monterey.

19 Ultimately, Intel's IA-64 processor did not ship  
20 until mid-2001, and once it arrived, it performed poorly. And  
21 as a result, Intel and Hewlett-Packard repositioned it  
22 primarily as an evaluation and development platform. There was  
23 a substantial decrease in market interest and confidence in  
24 IA-64, and, therefore, in the Monterey 64 product under  
25 development in Project Monterey.



1           In 2000 Santa Cruz announced that it was selling its  
2 server software and professional services divisions and its  
3 Unix-related assets to Caldera Systems, Inc. As a result IBM  
4 exercised its right to terminate Project Monterey on June 19,  
5 2001. In March 2003 Caldera sued IBM in the District of Utah  
6 for a breach of contract, copyright infringement, unfair  
7 competition, and tortious interference among other things.  
8 Shortly after filing the suit, Caldera changed its name to the  
9 SCO Group.

10           The initial complaint filed on March 6 by Caldera  
11 brought claims for misappropriation of trade secrets, unfair  
12 competition, interference of contract, and breach of contract.  
13 See ECF Number 124-15 at pages 27 to 34. The second amended  
14 complaint brought under the name SCO added more claims,  
15 including copyright infringement. See 124-16 at pages 32 to  
16 61.

17           In the second amended complaint or SAC, SCO alleged  
18 that IBM had infringed copyrighted code that SCO's predecessor  
19 had obtained from Novell, Inc., in 1995. See 124-16 at pages  
20 11 to 12 and 50 to 52. In a proposed third amended complaint  
21 dated October 14, 2004, SCO sought permission to add a  
22 copyright infringement claim arising from IBM's alleged  
23 misappropriation of different code to which IBM had been given  
24 access during Project Monterey, which code IBM allegedly  
25 incorporated into IBM's operating systems in breach of the JDA.

1 See paragraph 21. SCO claimed to have learned about this  
2 alleged theft by IBM only during discovery in the Utah case.  
3 IBM opposed the motion to amend as untimely, and the District  
4 Court denied the motion. See paragraphs 21 and 22.

5 In the same time frame SCO was litigating with Novell  
6 over which party owned the Unix and UnixWare copyrights that  
7 SCO's predecessor had allegedly purchased from Novell in 1995.  
8 Shortly after an adverse ruling on August 10, 2007, SCO filed  
9 for bankruptcy in the District of Delaware, and on  
10 September 20, 2007, the *SCO v. IBM* case in Utah was temporarily  
11 closed administratively. See paragraphs 26 through 28.

12 In connection with SCO's bankruptcy proceeding, SCO  
13 and Xinuos entered into an asset purchase agreement or APA on  
14 January 19, 2011. The APA granted Xinuos certain, quote,  
15 acquired assets, unquote, but carved out, quote, excluded  
16 assets, unquote, from the transfer. The APA clarified that the  
17 acquired assets did not include, quote, any rights, claims, or  
18 causes of action related to Novell, Inc., IBM, Red Hat, Inc.,  
19 and SUSE Linux GmbH or other similar claims, unquote, belonging  
20 to SCO, and Section 2.1(c) reinforced that the excluded assets  
21 did not fall within the definition of acquired assets. See  
22 paragraphs 32 to 33.

23 The excluded assets included any of SCO's causes of  
24 action, rights, and remedies against IBM and Red Hat in  
25 relation to claims arising from the Unix or UnixWare

1 intellectual property, and, therefore, all of SCO's claims  
2 against IBM and Red Hat remained an asset of the bankruptcy  
3 estate. Paragraph 34. Plaintiff disputes this fact by  
4 asserting that the excluded assets solely excluded the assets  
5 that the bankruptcy estate would need to continue to pursue its  
6 existing litigation against IBM and any other litigations that  
7 were still active. That's in plaintiff's paragraph 34.

8 But the plain language of the APA excludes, quote,  
9 all rights and interests in all litigation claims pending or  
10 that may be associated in the future, unquote, against IBM by  
11 SCO and, quote, every claim of any nature whatsoever known or  
12 unknown that has been or may be asserted by SCO against Red  
13 Hat, Inc., unquote.

14 Xinuos paid 600,000 cash for the acquired assets.  
15 Defendants assert that these assets constituted almost the  
16 entirety of SCO's software business. Paragraph 35. Plaintiff  
17 asserts that the assets included all of SCO's software and  
18 copyrights but without citing to evidence to support this  
19 assertion. The only evidence cited in plaintiff's paragraph 35  
20 supports the first statement of plaintiff's response, and there  
21 is no evidence cited to support the second part.

22 Federal Rules of Civil Procedure 56 requires a party  
23 asserting that a fact is genuinely disputed to support that  
24 assertion with citations to particular parts of materials in  
25 the record. That's Rule 56(c)(1)(A), and Local Rule 56(d) says

1 that each statement by the movant or opponent ... including  
2 each statement controverting any statement of material fact  
3 must be followed by citation to evidence which would be  
4 admissible.

5           So plaintiff has failed to properly address  
6 defendant's assertion of fact in the second part of the  
7 statement in paragraph 35, and that fact is considered  
8 undisputed for purposes of the motion. See *Cruz v. Wyckoff*  
9 *Heights*, 2016 Westlaw 4533568 at page 1, Southern District,  
10 July 19, 2016. See also *Amnesty America v. Town of West*  
11 *Hartford*, 288 F.3d 467 at 470, which noted that Rule 56 does  
12 not impose an obligation on a district court to perform an  
13 independent review of the record to find proof of a factual  
14 dispute.

15           On March 7, 2011, the Delaware bankruptcy court  
16 approved the APA, finding that the terms and conditions  
17 constituted fair consideration for the acquired assets. The  
18 bankruptcy court's approval was based on the understanding that  
19 SCO was retaining SCO's Project Monterey claim, and indeed SCO  
20 pursued that claim in the Utah litigation for years thereafter.  
21 Plaintiff disputes this fact by asserting that the excluded  
22 assets included the then pending unfair competition claim but  
23 did not include any other claims, including copyright  
24 infringement claims that were yet to accrue because no other  
25 claims were pending at the time, and SCO was transferring all

1 assets, including the right to bring claims that accrued to  
2 Xinuos after the APA sale was completed. This is all in  
3 paragraphs 36 through 40. Plaintiff does not address copyright  
4 claims that had accrued but not yet been brought.

5 In November and December of 2011, SCO urged the  
6 District Court in the District of Utah to reopen *SCO v. IBM*.  
7 That occurred in June of 2013. SCO conceded that the rule  
8 obtained by Novell meant that SCO could no longer pursue in the  
9 Utah case the copyright claims it had originally brought which  
10 were based on code that the court in the SCO-Novell litigation  
11 found belonged to Novell. See ECF 127-15 at page 3.

12 While SCO's attempt to amend to include an  
13 infringement claim relating to the code IBM allegedly stole  
14 from Project Monterey had been denied -- paragraphs 21 and  
15 22 -- SCO included the alleged misuse of the Project Monterey  
16 code as evidence for its unfair competition claim, and IBM and  
17 SCO thus litigated whether IBM stole the PM code or had a  
18 license to it. Paragraphs 23 and 24.

19 In August 2013 after the Utah District Court in July  
20 dismissed several of SCO's claims, SCO explained that the core  
21 of its remaining claims included that in connection with  
22 Project Monterey, IBM misappropriated UnixWare source code into  
23 its AIX for Power products in violation of the JDA.  
24 Paragraphs 43 to 44. Plaintiff attempts to dispute this  
25 statement by asserting the copyright infringement related to

1 the post-1995 code was not being litigated at that time --  
2 plaintiff's paragraph 44 -- but whether IBM had misappropriated  
3 Project Monterey code was at issue as part of the unfair  
4 competition claim. See ECF Number 124-30 at page 3.

5 On December 15, 2014, the Utah District Court entered  
6 summary judgment in favor of IBM on several counterclaims. One  
7 of the claims that remained was SCO's claim for unfair  
8 competition concerning Project Monterey. In March 2015 the  
9 parties agreed in a status report that SCO's claim against IBM  
10 was ripe for adjudication. The parties supplemented their  
11 previously filed motions for summary judgment, and SCO argued  
12 that it was undisputed that IBM obtained SCO's code through  
13 Project Monterey and used it in its AIX for Power product. See  
14 paragraphs 43 through 48.

15 In February 2016 the court granted summary judgment  
16 for IBM on SCO's remaining claims, and SCO appealed to the  
17 Tenth Circuit, challenging several of the District Court's  
18 rulings, including its order granting summary judgment against  
19 SCO on the unfair competition claim concerning Project Monterey  
20 and its order denying leave to amend to add a copyright  
21 infringement claim concerning Project Monterey.

22 In papers submitted to the Circuit Court, SCO argued  
23 that IBM exploited its relationship with SCO through Project  
24 Monterey by misappropriating SCO's code and using it for its  
25 own operating system. Paragraphs 49 through 52. In

1 January 2018 the Tenth Circuit affirmed the District Court's  
2 rulings except it remanded for trial the unfair competition  
3 claim based on misappropriation of SCO's code. IBM had argued  
4 that that claim was untimely under the JDA, and SCO argued that  
5 the two-year limitation in the JDA should not apply to the  
6 misappropriation claim because it was not a breach of contract  
7 claim.

8           The Tenth Circuit held that the misappropriation  
9 claim was related to a breach of the JDA and, therefore,  
10 applied the JDA's two-year limitation's period but found the  
11 claim timely. It found that there were fact issues as to  
12 whether, as SCO alleged, IBM misappropriated the code and did  
13 so in bad faith by pretending to support Project Monterey and  
14 issuing a sham IA-64 product to legitimize its theft.

15           The Tenth Circuit also noted that a claim for unfair  
16 competition required SCO to prove not just copyright  
17 infringement but also bad faith. So in that sense, the  
18 copyright infringement was a lesser included claim of the  
19 unfair competition claim. SCO sought hundreds of millions of  
20 dollars in damages from IBM through the unfair competition  
21 claim. See paragraphs 53 through 56 and 25 as well as the  
22 Tenth Circuit's SCO decision at 1078 -- sorry -- 1075 through  
23 1081.

24           In February of 2018, SCO and IBM, in a joint status  
25 report, informed the Utah District Court that SCO's remaining

1 unfair competition claim concerned the allegation that IBM  
2 misappropriated into its AIX for Power operating system  
3 UnixWare source code that SCO provided to IBM through Project  
4 Monterey. Paragraph 57 and ECF Number 124-36 at pages 2 to 3.  
5 *SCO v. IBM* garnered media attention, including regarding the  
6 Project Monterey claim. Paragraphs 59 through 64.

7 XinuOS never raised any objection to SCO's continued  
8 assertion of its Project Monterey claim against IBM and did not  
9 lay claim to any relating to Project Monterey until after the  
10 Tenth Circuit affirmed the Utah District Court's decision that  
11 precluded SCO from asserting the copyright infringement claim  
12 as untimely. Paragraphs 65 to 67.

13 On March 26, 2019, XinuOS sent a letter to IBM  
14 accusing IBM of unauthorized uses of XinuOS's copyrighted code  
15 in IBM's AIX and Linux-based operating systems and unauthorized  
16 contribution of XinuOS's copyrighted code to both the Red Hat  
17 Linux and SUSE Linux operating systems. On March 31, 2021,  
18 plaintiff filed its complaint in this action. Paragraphs 68  
19 and 69.

20 On August 17, 2021, SCO and IBM settled the Utah  
21 litigation. Under the agreement SCO released any and all  
22 claims against IBM, including claims, quote, concerning,  
23 related to, arising out of, or arising from the Utah  
24 litigation, the proof of claim for IBM's relationship with (SCO  
25 or its predecessors), Project Monterey, or IBM's relationship



1 with SCO. That's in paragraph 80. The settlement further  
2 clarified that the release included any claims against IBM or  
3 Red Hat, belonging to SCO. See paragraphs 78 through 81.

4 Plaintiff disputes these statements by asserting that  
5 the terms of the settlement had nothing to do with its claims  
6 for copyrights it purchased a full decade before the  
7 settlement. Plaintiff's paragraphs 80 to 81. Plaintiff also  
8 objected to the settlement itself in the bankruptcy court, but  
9 on October 14, 2021, the bankruptcy court overruled that  
10 objection and approved the settlement. The bankruptcy court  
11 did not determine exactly what claims Xinuos might or might not  
12 be able to assert against IBM in this litigation, which was  
13 then pending in the U.S. Virgin Islands, but noted that, quote,  
14 Xinuos, Inc., reserves the right to argue that the release in  
15 the settlement agreement does not bar any claims it has  
16 asserted against IBM in *Xinuos, Inc., v. IBM*, 21-cv-31, DVI,  
17 and IBM reserves the right to argue that the settlement bars  
18 such claims, unquote.

19 The bankruptcy court expressly stated that it  
20 approved of the settlement agreement, including the release of  
21 the bankruptcy estate's claims against IBM. The bankruptcy  
22 court also declined Xinuos's proposal to include language in  
23 its order that the settlement did not bar Xinuos from asserting  
24 that IBM infringed and continues to infringe copyrights that it  
25 had purchased. On November 5, 2021, the Utah District Court

1 dismissed SCO's remaining claims against IBM with prejudice.  
2 This is all in paragraphs 80 through 93.

3 On November 16, 2022, this case was transferred here  
4 to the Southern District of New York. Between December 21 and  
5 23, 2022, Xinuos served 74 discovery requests on defendants  
6 that relate in large part to Project Monterey and the *SCO v.*  
7 *IBM* litigation, including all documents and communications  
8 referring or relating to Project Monterey, all discovery  
9 responses, and all deposition transcripts from *SCO v. IBM*, and  
10 the source code for a number of versions of IBM software dating  
11 back to 2000.

12 On January 10, 2022, Xinuos served its initial  
13 disclosures under Rule 26, which identified more than 60  
14 individuals identified with -- excuse me -- associated with IBM  
15 and SCO, who allegedly possessed knowledge relative to Xinuos's  
16 claims. On January 17, 2023, I granted defendant's request to  
17 file their dispositive motions, and I stayed discovery pending  
18 their resolution. See paragraphs 94 and 97.

19 Now I'll summarize the facts as they relate to the  
20 motion to dismiss the antitrust claims, and for purposes of  
21 that motion, I accept as true the facts, although not the  
22 conclusions, set forth in the plaintiff's complaint, which is  
23 ECF Number 1.

24 IBM and Xinuos's predecessor entered into a joint  
25 venture, Project Monterey, through which IBM gained

1 confidential access to code to which plaintiff says it has  
2 copyright rights. See paragraphs 43 and 55 through 56.  
3 According to the complaint, IBM then terminated Project  
4 Monterey without gaining any rights to the code under the  
5 applicable agreement but nevertheless used the code by  
6 incorporating it into several of AIX products. Paragraph 57 to  
7 60. With the benefit of the code, IBM software became more  
8 competitive, but IBM still had competitors, including Xinuos  
9 and Red Hat. Paragraph 74 to 75.

10 IBM approached Red Hat, and they agreed to dominate  
11 the Unix and Linux paid server operating system market by  
12 dividing that market, promoting each other's products, and  
13 granting each other technical information that was not made  
14 widely available and from which Xinuos and others were  
15 excluded. Paragraphs 78 to 79. Red Hat and IBM agreed that  
16 Red Hat would take control of the low end of the relevant  
17 Unix/Linux paid server operating system market, and IBM would  
18 maintain the high end. Red Hat and IBM established a multiyear  
19 alliance to package each other's services and target clients  
20 based on their location in the market. They agreed to do joint  
21 marketing, jointly approach customers, and refrain from  
22 competing for the same customers.

23 Rather than competing with Red Hat, IBM drove its  
24 low-end customers to Red Hat's services, drove its high-end  
25 customers to IBM's services, and also integrated Red Hat

1 technology into IBM's software. IBM offered rebates of up to  
2 \$10,000 to customers that bought IBM servers packaged with Red  
3 Hat's Linux-based operating system RHEL but refused to offer  
4 similar rebates for other competing operating systems. IBM  
5 also reimbursed server business partners as much as \$3,000 to  
6 get certified to use Red Hat software and provided courses on  
7 RHEL applications. Xinuos submits that these actions excluded  
8 rivals from the low- and high-end markets, locked customers in,  
9 and deprived Xinuos of substantial benefits. See paragraphs 5,  
10 7, 15, and 85 through 96.

11 IBM ultimately made RHEL the default operating system  
12 across its server products instead of making its own operating  
13 system the default and extended RHEL's capabilities on its  
14 servers, causing large enterprises to leave competing servers  
15 and move to IBM servers running RHEL. IBM enabled RHEL  
16 installations in larger enterprise data centers instead of  
17 installing its own operating systems. When IBM entered the  
18 cloud market, it made RHEL the default choice for the operating  
19 system in IBM's hybrid cloud and promoted RHEL instead of its  
20 own operating systems. Paragraphs 97 through 103.

21 Installation of IBM's operating systems have  
22 decreased, but they are dominant in the high-end market.  
23 Paragraphs 105 and 107. Meanwhile, installations of RHEL have  
24 grown because of IBM's backing, and support for Xinuos's  
25 equally featured product has decreased. Paragraphs 108 through

1 112 and 118. To the extent that any of IBM's customers  
2 were moving to Linux, IBM transitioned that business to Red  
3 Hat. Paragraph 113. This prevented XinuOS and others from  
4 competing because in some of IBM's customers, RHEL would be  
5 installed as a matter of course. Paragraph 115.

6 IBM's arrangement with Red Hat caused consumers to  
7 migrate to RHEL to the detriment of other competitors, and  
8 defendants have become the world's two largest commercial Linux  
9 developers. Paragraphs 119 to 120. IBM did not offer to  
10 XinuOS the same technical advantages and opportunities that it  
11 provided to Red Hat and stopped supporting XinuOS's operating  
12 system on its cloud computing platform for no legitimate  
13 procompetitive reason. See paragraphs 123 to 126 and 132. In  
14 doing so, IBM has made extraordinary money from its collusion  
15 with Red Hat, denied consumers the benefit of XinuOS's program,  
16 and caused developers and manufacturers who would otherwise  
17 support XinuOS to believe that getting XinuOS's program is not  
18 worth it. Paragraphs 131 to 135.

19 Defendants control over 64 percent of the Unix/Linux  
20 server market and control the most lucrative licenses to the  
21 exclusion of any competitors. Paragraph 137. XinuOS alleges  
22 that this conduct has harmed market competition because  
23 defendants have extraordinary access to and control over the  
24 high- and low-end markets, causing rivals to compete at a  
25 disadvantage or making it impossible for them to compete at

1 all. This disadvantage is reinforced by the fact that existing  
2 customers are unlikely to migrate to new products due to time,  
3 switching cost, and risk and developers and manufacturers are  
4 disproportionally willing to work on products created by  
5 defendants given their controlling share of the market. This  
6 makes it difficult for competitors to lure customers away from  
7 IBM and Red Hat despite their high prices, and it's expensive  
8 for Xinuos and others to develop similar scale and network  
9 effects competitive with IBM and Red Hat. Paragraphs 140  
10 through 146 and 149.

11 Xinuos also alleges that this conduct harms customers  
12 because those who would otherwise move to Xinuos's systems are  
13 locked in. The high-end customers face significant costs to  
14 migrate to other services, and the low-end customers are locked  
15 in because of their investment in RHEL and Red Hat's and IBM's  
16 inordinate scale and control. Paragraphs 151, 152 and 161.  
17 Xinuos is specifically damaged because the expansion of  
18 existing server operating system products like its own has been  
19 thwarted by IBM's and Red Hat's dominance, and application  
20 developers, hardware manufacturers, and partners only want to  
21 support IBM and Red Hat and do not support new entrants or the  
22 growth of competing systems. Paragraph 160.

23 IBM and Red Hat are now merged, and since the merger  
24 IBM has sought to control Linux and eliminated a free version  
25 of Red Hat Linux called CentOS. Paragraphs 163 to 164. Within

1 three months of the merger, IBM increased prices for its  
2 on-premises server software products and increased service and  
3 maintenance fees by around 10 percent. Paragraphs 166 to 67.  
4 Plaintiff alleges that all of defendant's bad acts were enabled  
5 by IBM infringing the copyrighted code -- paragraphs 171 to  
6 74 -- and posed the threat that defendants can increase prices  
7 and provide low quality products due to high switching costs  
8 and customer lock-in while also reducing customer choice.  
9 Paragraph 168.

10 The procedural history is as follows. The initial  
11 complaint was filed by plaintiff against IBM and Red Hat in the  
12 Virgin Islands on March 31, 2021. On June 7 of that year,  
13 defendants filed a motion to dismiss and to transfer the case  
14 here. Plaintiff opposed both motions on August 11 of that  
15 year. On November 1 of that year, defendants moved to stay  
16 discovery pending resolution on the motion to transfer.  
17 Plaintiff opposed and defendants replied in November 2021.

18 The parties filed supplemental briefing on the motion  
19 to transfer on January 7 and 12, 2022. On April 26, 2022, the  
20 court granted defendant's motion to stay discovery pending  
21 resolution of the transfer motion, and on November 14, 2022,  
22 the court granted defendant's motion to transfer, and the case  
23 arrived here on November 16. On December 22 defendants filed  
24 before me a premotion letter in anticipation of its motions.  
25 At the pre-motion conference, I terminated defendant's

1 previously filed motion and authorized them to file a renewed  
2 motion, and the instant motions followed. The papers can be  
3 found at ECF Numbers 118 through 124.

4 I won't take the time to summarize the standards that  
5 govern a motion to dismiss. We should all be familiar with  
6 *Bell Atlantic v. Twombly*, 550 U.S. 544, and *Ashcroft against*  
7 *Iqbal*, 556 U.S. 662. I will note that in deciding a motion to  
8 dismiss under Rule 12(b)(6), I may consider obviously the facts  
9 alleged in the complaint and any documents attached to the  
10 complaint as exhibits or incorporated in it by reference. Even  
11 if a document is not incorporated by reference, I can still  
12 consider it where the complaint relies heavily on its terms and  
13 effect, rendering the document integral to the complaint.

14 But the plaintiff has to rely on the document. Mere  
15 notice or possession is not enough, and even if a document is  
16 integral, there must be no dispute regarding authenticity,  
17 accuracy, or relevance. *U.S. against AECOM*, 19 F.4th 85 at  
18 106. I can also consider matters of which I can take judicial  
19 notice under Evidence Rule 201. *Kramer versus Time Warner*, 937  
20 F.2d 767 at 773, and this includes information on a party's  
21 public website as long as the authenticity of the site is not  
22 in dispute, but such information can be considered only for the  
23 fact it was said, not for its truth. *Cotiviti versus McDonald*,  
24 2021 Westlaw 2784529 at page 6, Southern District, July 2,  
25 2021. And by the way, to the extent I quote cases today, I



1 omit internal citations, quotation marks, footnotes, and  
2 alterations.

3 As part of its motion to dismiss, defendants filed  
4 the declaration of Kathryn E. Bolas, which is ECF Number 120,  
5 to which they attached three exhibits. Exhibit A was a copy of  
6 Red Hat's 2019 10-K, Exhibit B was a copy of IBM's May 3rd 219  
7 8-K, and Exhibit C was a copy of the European commissions press  
8 release titled "Mergers: Commission Approves Acquisition of  
9 Red Hat by IBM" dated June 27, 2019. I can take judicial  
10 notice of the 10-K and the 8-K as legally required public  
11 disclosure documents filed with the SEC but only for the fact  
12 that the matters in them were publicly asserted, not for their  
13 truth. *Sec. versus Fiore*, 416 F. Supp. 3d 306 at 328 to 29,  
14 Southern District 2019. See *Kavowras v. New York Times*, 328  
15 F.3d 58 at 57.

16 I also take judicial notice of the EC press release,  
17 but for the fact that the information exists, not for the truth  
18 of the matters asserted. See *Staehr v. Hartford*, 547 F.3d 406  
19 at 425, and *In re Merrill Lynch*, 851 F. Supp. 2d 512 at 526,  
20 Note 4, Southern District 2012, affirmed 571 F. App'x 8. I  
21 also won't take the time to familiarize the law governing  
22 motions for summary judgment. We should all be familiar with  
23 it.

24 I'll start with the motion for summary judgment. IBM  
25 argues that the copyright cause of action in this case was

1 retained by SCO in the APA, that IBM litigated that issue with  
2 SCO and settled it, and that Xinuos has no basis to revive it  
3 now. Plaintiff argues that it is not bringing the same claim  
4 that SCO settled but rather is suing for new infringements that  
5 occurred when it, not SCO, was the owner of the code.

6 This dispute first requires me to determine what code  
7 is at issue. Plaintiff alleges that the code at issue was all  
8 created after September 19, 1995. That's in the complaint,  
9 paragraph 43. To make clear that it is not the same code that  
10 Novell actually owns, it also argues that it is suing on,  
11 quote, code developed outside of the JDA and Project Monterey,  
12 unquote. That's in plaintiff's opposition at page 2 and also  
13 pages 15 to 16. But there's no support cited for that  
14 proposition, perhaps not surprisingly as the complaint is clear  
15 that the code on which plaintiff is suing is the code to which  
16 defendant got confidential access during Project Monterey and  
17 which plaintiffs says defendant continued to use even though it  
18 had no rights to do so under the JDA. See paragraphs 56 and 57  
19 of the complaint.

20 Plaintiff repeatedly notes that there are copyrights  
21 at issue in this dispute that were not previously asserted by  
22 SCO. See plaintiff's 56.1 response, paragraph 73 to 74. But  
23 this assertion is unsurprising as two of the copyrights on  
24 which it is suing were not registered until 2020 and likely in  
25 preparation for this lawsuit. The question is not when the

1 copyrights were registered but what code is at issue, and  
2 plaintiff has identified no code on which it is suing other  
3 than that which IBM allegedly stole during Project Monterey,  
4 which ended in 2001. The APA, into which plaintiff and SCO  
5 entered in 2011, excluded any claims SCO had against IBM or Red  
6 Hat. See the 56.1 paragraphs 30 through 34.

7 Defendant goes too far if it needs to argue that the  
8 APA carved out any conceivable claim SCO or its successor could  
9 ever have against IBM or Red Hat. Excluded claims are only  
10 those belonging to SCO at the time of the APA. The plaintiff  
11 goes too far if it means to argue that the APA carved out only  
12 claims SCO had already brought. The excluded claims include  
13 those that had accrued to SCO that it would have the right to  
14 assert in the future.

15 So the operative question here is when the claim at  
16 issue accrued. If it was before the APA was signed, the claim  
17 belongs to SCO, and SCO retained and eventually released it,  
18 and plaintiff cannot sue on it now. If it accrued after the  
19 APA, the plaintiff is free to sue on it. Quote, civil actions  
20 under the Copyright Act must be brought within three years  
21 after the claim has accrued, unquote. *Kwan v. Schlein*, 634  
22 F.3d 224 at 228. Quote, an ownership claim accrues only once  
23 when a reasonably diligent plaintiff would have put on inquiry  
24 as to the existence of a right, unquote. *Walker v. Carter*, 210  
25 F. Supp. 3d 487 at 504, Southern District, 2016.

1           In other words, quote, copyright ownership claims  
2 accrue when a plaintiff knows or has reason to know of the  
3 injury upon which the claim is premised, unquote. *Big E.*  
4 *Entertainment v. Zomba Enterprises*, 453 F. Supp. 2d 788 at 794,  
5 Southern District, 2006, affirmed 259 F. App'x 413. Quote, if  
6 a party who believed that she was the rightful owner of a  
7 statutory copyright became aware that someone else was claiming  
8 to own her copyright, she will have three years to bring an  
9 action asserting her ownership. In essence an action to quiet  
10 title to the copyright pursuant to 17 U.S. Code Section 507(b),  
11 unquote. *Flo & Eddie, Inc., v. Sirius XM Radio*, 80 F. Supp 3d  
12 535 at 542, Southern District, 2015.

13           Quote, a copyright infringement claim is an ownership  
14 claim when it does not involve the nature, extent, or scope of  
15 copying but instead focuses on competing assertions of  
16 ownership or rights in the work at issue, unquote. *Roberts*  
17 *versus BroadwayHD*, 518 F. Supp. 3d 719 at 730 to 31, Southern  
18 District, 2021. I'm going to call that case *Roberts I.* Quote,  
19 by contrast, an infringement action may be commenced within  
20 three years of any infringing act regardless of any prior acts  
21 of infringement, unquote. *Kwan* at 228. But, quote, the Second  
22 Circuit has held that when ownership is the dispositive issue  
23 in an infringement claim and the ownership claim is time  
24 barred, the infringement claim itself is time barred even if  
25 there had been infringing activity in the three years preceding

1 the lawsuit, unquote. *Charles v. Seinfeld*, 410 F. Supp. 3d 656  
2 at 659, Southern District, 2019, affirmed 803 F. App'x 550.

3 Quote, thus the question of how to classify a claim  
4 is of great consequence, unquote. *Walker* at 504. Quote, as  
5 the Second Circuit has explained, infringement claims requires  
6 a plaintiff to establish ownership of a valid copyright and  
7 copying of the constituent elements of the work, unquote.  
8 *Walker* at 50405. Quote, in many infringement cases, the first  
9 element (ownership) is not at issue, and the issue is instead  
10 whether the defendant impermissibly copied the work. In  
11 contrast, where a dispute does not involve the nature, extent,  
12 or scope of copying, ownership forms the backbone of the  
13 infringement claim at issue, and if an ownership claim would be  
14 time barred, any infringement claim is likewise time barred.

15 The question then is whether the plaintiff's claims  
16 are rooted in the contested assertion of ownership interest in  
17 the copyright, unquote. That's all *Walker* at 104 to 105, which  
18 goes on to say, quote, to answer that question, courts must  
19 examine the substance of the claim rather than how plaintiffs  
20 label the cause of action. Courts should consider such factors  
21 as whether the plaintiff concedes in any filings that questions  
22 of ownership and authorship are at the heart of the claim,  
23 whether the plaintiffs copyright ownership is conceded by the  
24 defendant, whether the plaintiff alleges anything specific  
25 about the means of infringement, and whether the lawsuit is

1 between two parties who claim ownership of the copyrights.

2 Again, *Walker* at 504 to 05.

3           If this case presents an ownership claim, it occurred  
4 only once when the code's owner was on notice that defendant  
5 was exercising the right incompatible with its ownership, which  
6 would be when defendant started using the code it allegedly  
7 stole in 2001. In that event the claim belongs to SCO, which  
8 owned the copyright, then retained the claim by carving it out  
9 of the APA, and tried to assert the claim in 2004 in the Utah  
10 litigation. If this is an infringement claim, plaintiff can  
11 sue for any product defendant released going back three years  
12 from when it filed suit.

13           I conclude that plaintiff is asserting an ownership  
14 claim. As a preliminary matter, I recognize that,  
15 quote/unquote, ownership is not precisely what is at issue  
16 here, but rather the question is whether defendant obtained a  
17 license that gave it the right to use the code. But it seems  
18 to me that the analysis ought to be the same. Is the dispute  
19 about whether the defendant had the legal right to use the  
20 code, or is it about whether or not the defendant, in fact,  
21 used it?

22           Thus the first two factors ought to be reframed here  
23 as whether plaintiff concedes that the right to use is at the  
24 heart of the dispute and whether defendant concedes it lacks  
25 the right to use. On those two factors, the claim here as

1 framed by plaintiff is that defendant exploited the access it  
2 had to the code during Project Monterey by using the code after  
3 Project Monterey ended without having the right to do so under  
4 the JDA. The complaint squarely raises the issue of whether  
5 defendant got rights under the JDA to use the code -- see  
6 complaint paragraph 57 -- and the crux of the dispute as it has  
7 progressed is clearly whether defendant has had rights to the  
8 code. Defendant says yes because the JDA so provides, and  
9 plaintiff says no because the supplements limited defendants  
10 rights to an IA-64 product, which it never generally released.

11 Thus it seems to me the question is defendant's  
12 rights, if any, are at the heart of the copyright claims in  
13 this case. Plaintiff does not explicitly concede this, but  
14 there's really to other reasonable inference from its arguments  
15 that defendant did not gain a license because it never produced  
16 an IA-64 product with general availability. See plaintiff's 56  
17 response, paragraphs 9 and 11, and plaintiff's opposition brief  
18 at 3, 4 and 16, Note 13. Defendant has not conceded that it  
19 lacked the right to use the code.

20 With respect to the third factor, not only does  
21 plaintiff not allege any specific about the means of  
22 infringement beyond saying defendant incorporated into its  
23 products code that it stole, but defendant does not seem to  
24 dispute that the code is, in fact, incorporated in its product.  
25 See defendants 56.1, paragraphs 10 and 11, and defendants

1 summary judgment brief at 15 and 23. Defendant does not claim  
2 it is not using the code. It is arguing that it had a right to  
3 do so and that in any event it settled the matter with SCO.  
4 See defendant's brief at 15 through 17.

5           Quote, a copyright infringement claim is an ownership  
6 claim when it does not involve the nature, extent, or scope of  
7 copying but instead focuses on competing assertions of  
8 ownership or rights in the work at issue, unquote. *Roberts I*  
9 at 730 to 31. See *Kwan* at 229, which found that ownership  
10 formed the backbone of the, quote/unquote, infringement claim  
11 at issue in that case because the dispute did not involve the  
12 nature, extent, or scope of copying. In the *Robert's* case, the  
13 court initially found the dispute to be an ownership claim but  
14 later found that an amended claimant stated an infringement  
15 claim. See *Roberts v. BroadwayHD*, 2022 Westlaw 976872 at  
16 page 9, Southern District, March 31, 2022, which I'm going to  
17 call *Roberts II*.

18           The initial complaint focused on allegations that one  
19 set of defendants reassigned rights to the work among  
20 themselves and granted another defendant a license to use the  
21 works, and the court found this suggested an assertion of  
22 ownership by those defendants. See *Roberts I* at 731 to 32.  
23 The amended complaint alleged that defendants, knowing that  
24 plaintiff was a copyright owner of the work at issue, received  
25 a limited license to use the work and exceeded the scope of the



1 license by sublicensing the work. See *Roberts II* at 9.

2 While the facts here bear superficial similarity to  
3 *Roberts II*, there the plaintiff acknowledged that the defendant  
4 had a legitimate license and alleged that defendant went beyond  
5 what the license allowed. *Roberts II* at 9. Here plaintiffs  
6 argue not only that any license defendant could have obtained  
7 under the JDA was limited to use in an IA-64 application but  
8 that because defendant never launched such an application it  
9 had and has no right to use the code at all. I thus find this  
10 case differs significantly from *Roberts*. Whether IBM had a  
11 right to use the code at all strikes me as an ownership claim,  
12 not an infringement claim.

13 On the fourth factor, the dispute is between two  
14 parties, who both claim the right to use the code. So I  
15 conclude that the claim here is, for accrual purposes, an  
16 ownership claim. Quote, accrual of such a claim can be  
17 triggered by another party's expressed assertion of sole  
18 authorship or ownership, by implicit repudiation by consciously  
19 exploiting the copyright without paying royalties, or when  
20 alleged co-owners learn they are entitled to royalties that  
21 they are not receiving, unquote. *Roberts I* at 731.

22 Here the claim accrued well before Xinuos acquired  
23 its interest in the code in 2011. Indeed, SCO attempted to  
24 assert the claim in the Utah litigation in 2004. Plaintiff  
25 alleges that it only became aware of the code's theft and

1 infringement in March 2019 in the complaint, paragraph 73, an  
2 allegation that is hard to believe given that plaintiff must  
3 have done its due diligence before entering into the APA and  
4 familiarized itself with the Utah litigation and because the  
5 dispute was the subject of coverage in industry publications.  
6 But even if it is true, it is irrelevant because the claim  
7 accrued only months when the code and the claim belonged to  
8 SCO, and SCO has released defendants from it. See paragraphs  
9 78 through 81 of 56.1.

10 Defendants are therefore entitled to summary judgment  
11 on the copyright claim.

12 Before I move on antitrust, let's take a little  
13 break, and I'll come back in five minutes.

14 (Recess)

15 THE DEPUTY CLERK: All rise.

16 THE COURT: Everyone can have a seat. All right.  
17 Turning now to the motion to dismiss. The first issue is  
18 antitrust standing. Quote, to survive the pleading stage, an  
19 antitrust plaintiff must demonstrate that it has antitrust  
20 standing, unquote. *IQ Dental Supply v. Henry Schein, Inc.*, 924  
21 F.3d 57 at 62. To demonstrate antitrust standing, a plaintiff  
22 must plausibly allege, quote, one, that it suffered a special  
23 kind of antitrust injury, and, two, that is a suitable  
24 plaintiff to pursue the alleged antitrust violations and thus  
25 is an efficient enforcer of the antitrust laws, unquote. *IQ*

1 *Dental* at 62. Defendants argue the plaintiff fails this test.

2 I will take each prong in turn. The Second Circuit  
3 uses a three-part test established in *Gatt Communications v.*  
4 *PMC*, 711 F.3d 68, to determine whether a plaintiff has  
5 sufficiently alleged antitrust injury. Quote, one, the court  
6 must identify the practice complained of and the reasons such a  
7 practice is or might be anticompetitive; two, the court must  
8 identify the actual injury the plaintiff alleges which requires  
9 it to look at the ways in which the plaintiff claims it is in a  
10 worse position as a consequence of defendant's conduct; and,  
11 three, the court compares the anticompetitive effect of the  
12 specific practice at issue to actual injury the plaintiff  
13 alleges, unquote. *IQ Dental* at 62 to 63.

14 For the first step, the plaintiff need only allege  
15 that the defendants have engaged in unlawful anticompetitive  
16 conduct, and the bar for such a showing is low. *IQ Dental* at  
17 63. Here plaintiff alleges that defendants agreed to dominate  
18 the relevant market by dividing the market, not competing with  
19 each other, promoting each other's products, sharing technical  
20 information with each other, and excluding Xinuos and other  
21 competitors. That's in the complaint, paragraphs 83 to 103.

22 Plaintiff also alleges that as a result of  
23 defendant's market control, customers are locked into  
24 defendant's product and forced to pay supracompetitive  
25 prices -- paragraph 88 and 150 to 157 -- and the defendants

1 have foreclosed market opportunities from competitors.  
2 Paragraph 136. Plaintiff has met its low burden because,  
3 quote, it well-settled law that horizontal market allocation  
4 agreements, concerted refusals to deal with price-fixing  
5 agreements, or boycotts are per se violations of the antitrust  
6 laws. *Eon Labs v. Watson Pharmaceuticals*, 164 F. Supp. 2d 350  
7 at 355, Southern District, 2001. See *Leegin Creative Leather*  
8 *v. PSKS*, 551 U.S. 877 at 886, which said, quote, restraints  
9 that are per se unlawful include horizontal agreements among  
10 competitors to fix prices or divide markets, unquote. See also  
11 U.S. v. American Express, 838 F.3d 179 at 194, which defined  
12 horizontal agreements as agreements between competitors at the  
13 same level of the market structure. Affirmed 138 Supreme Court  
14 2274.

15 As to the second factor, plaintiff must allege an  
16 actual injury, showing that it's in a worse position because of  
17 defendant's conduct. Plaintiff claims that a result -- as a  
18 result of defendant's agreement and conduct, it was denied  
19 opportunities to compete for customers and squeezed out of the  
20 market and faced a decline in support of its competitive  
21 software due to defendant's control over the market.

22 Paragraphs 118, 138, and 143 to 48. These allegations satisfy  
23 the second factor. In *IQ Dental Supply*, the court found that  
24 the plaintiff adequately alleged an actual injury where the  
25 plaintiff alleged that defendant's anticompetitive conduct

1 affected the market, and plaintiff's sales suffered as a  
2 result. 924 F.3d at 64.

3 For the third factor, plaintiffs have to allege that  
4 defendant's antitrust competitive conduct caused its actual  
5 injury. Plaintiff alleges it has faced a decline in its  
6 software sales and that its growth has been thwarted because of  
7 defendant's antitrust competitive conduct. See paragraphs 154  
8 to 60. Thus plaintiff has plausibly alleged that its injury,  
9 quote, flows from that which makes defendant's act unlawful,  
10 unquote, because it is, quote, the type of loss that the  
11 claimed violations would be likely to cause, unquote.

12 *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 at 489. *Accord IQ*  
13 *Dental* at 64 to 65.

14 So based on the three factors, I find that plaintiff  
15 has plausibly alleged an antitrust injury.

16 Defendants argue plaintiff has not done so because  
17 the complaint does not explain how competition has been harmed  
18 and simply states that defendants worked together to, quote,  
19 create better products and provide services, unquote. That's  
20 in defendant's brief. The argument is at pages 4 to 6. First,  
21 the complaint plainly alleges more than defendants improving  
22 their product. It alleges that because of defendant's  
23 collusion, plaintiff's, quote, equally featured, unquote,  
24 product has been excluded from the market, and defendants have  
25 unfairly gained market power because of consumer lock-in and

1 the disproportionate willingness of application developers and  
2 hardware manufacturers to work with defendants given their  
3 controlling share of the market. Paragraphs 138 to 49.

4 It may well turn out that all that is at work here is  
5 the defendant's products and service are superior, but that is  
6 not what the complaint alleges. And at this stage, I must  
7 accept the allegations in the complaint as true.

8 Second, the complaint alleges more than just harm to  
9 plaintiff. It explains how not just plaintiff but other  
10 competitors have been harmed in that they are locked out of the  
11 market even though their products are competitive, and they are  
12 forced to compete at a disadvantage. See paragraphs 20, 85,  
13 140, and 145. Turning to the second factor of the *Gatt* test,  
14 the plaintiff that has suffered an antitrust injury must also  
15 demonstrate that it's a suitable plaintiff. In other words, an  
16 efficient enforcer of the antitrust laws. *In re Aluminum*  
17 *Warehousing Antitrust Litigation* 823, F.3d 151 at 157 to 58. See  
18 *IQ Dental* at 65.

19 Quote, the efficient enforcer criteria must be  
20 established irrespective of whether the plaintiff is a consumer  
21 or a competitor, unquote, because, quote, not every victim of  
22 an antitrust violation needs to be compensated under the  
23 antitrust laws in order for the antitrust laws to be officially  
24 enforced, unquote. *Gelboim v. Bank of America*, 823 F.3d 759 at  
25 779.

1           Quote, to determine whether a plaintiff is an  
2 efficient enforcer of the antitrust laws, the Second Circuit  
3 directs courts to the following factors: One, the directness  
4 or indirectness of the asserted injury; two, the existence of  
5 an identifiable class of persons whose self-interest would  
6 normally motivate them to vindicate the public interest in  
7 antitrust enforcement; three, the speculativeness of the  
8 alleged injury; and, four, the difficulty of identifying  
9 damages and apportioning them among direct and indirect victims  
10 so as to avoid duplicative recoveries, unquote. *In re*  
11 *Amazon.com, Inc., eBook Antitrust Litigation*, 2023 Westlaw  
12 6006525 at page 14, Southern District, July 31, 2023.

13           The weight given to each factor varies depending on  
14 the case. See *Daniel v. American Board of Emergency Medicine*,  
15 428 F.3d 408 at 443. Quote, consumers -- sorry. Competitors  
16 and consumers in the market where trade is allegedly restrained  
17 are presumptively the proper plaintiffs to allege antitrust  
18 injury, unquote. That's *In Re Aluminum Warehousing* at 158,  
19 collecting cases. Defendants do not dispute that plaintiff is  
20 a competitor in the market, nor do they address this prong of  
21 the test in their papers. And in any event, I find the test is  
22 met.

23           The first factor, whether the violation was based --  
24 was a direct or remote cause of the injury is based on  
25 principles of approximate cause. In the context of antitrust

1 standing, approximate cause generally follows the first step  
2 rule, which requires some direct relation between the injury  
3 asserted and the injurious conduct alleged. *In re Platinum and*  
4 *Palladium Antitrust Litigation*, 61 F.4th 252 [sic] at 259.  
5 Here plaintiff has alleged that defendants hindered its  
6 business opportunities by dropping support for plaintiff's  
7 operating systems and that defendants excluded plaintiff's  
8 software program in the context of cloud computing and worked  
9 together to exclude plaintiff from the market, including by not  
10 providing certain upgrade services to plaintiff and others.  
11 Paragraphs 123 through 126. These are direct injuries flowing  
12 from the alleged conduct. See *Schulman v. Burlington*, 255  
13 F. Supp. 847 at 851, Southern District, 1966.

14           The second efficient enforcer factor considers  
15 whether there are plaintiffs that are better situated to  
16 vindicate the claims, which would, quote, diminish the  
17 justification for allowing a more remote party to perform the  
18 office of private attorney general, unquote. *In re American*  
19 *Express Anti-Steering Rules Antitrust Litigation*, 19 F.4th 127  
20 at 141. Plaintiff is a sufficiently motivated plaintiff as it  
21 is an immediate victim of any direct boycott and has suffered a  
22 direct loss of sales. *IQ Dental* at 68.

23           The third factor looks at whether plaintiff can  
24 produce a just and reasonable estimate of damages. *In re*  
25 *Platinum* at 262. Here plaintiff's damages could be its, quote,



1 potentially ascertainable business losses ... calculated based  
2 on its historical sales data without undue speculation,  
3 unquote. *IQ Dental* at 68. Even if that damages calculation  
4 were complicated, this factor carries less weight because the  
5 Supreme Court has warned that antitrust standing should not get  
6 the defendant out of court every time the damages calculation  
7 is contemplated. See *Apple v. Pepper*, 139 Supreme Court 1514  
8 at 1524 and *In re Platinum* at 262.

9           The fourth factor considers the risk of duplicative  
10 recoveries or complex reapportionment of damages such that the  
11 damages to which the plaintiff lays claim are the same damages  
12 that other parties could have claimed. See *American Express*  
13 *Anti-Steering*, 19 F.4th at 142. This factor favors plaintiff  
14 because there was no intermediary between plaintiff and  
15 defendants who could sue for the anticompetitive conduct, and  
16 recognizing antitrust standing would not require the court to  
17 divide damages from the same violation among multiple  
18 plaintiffs. *In re Platinum* at 265 to 66.

19           Further, quote, while there may be other parties  
20 property positioned to bring monopolization claims against  
21 defendants, their damages would be wholly distinct from those  
22 allegedly suffered by plaintiff, unquote, and quote, therefore,  
23 there's no risk that different groups of plaintiffs would be  
24 attempting to recover for the same exact injury, unquote. *In*  
25 *re Amazon eBook* at 16.

1           So on balance the four factors favor a finding that  
2 plaintiff is an efficient enforcer, and having found antitrust  
3 injury and that plaintiff is a proper plaintiff, I find  
4 plaintiff has an antitrust standing, and now address whether  
5 the Sherman Act and claimant -- preenact claims state a claim  
6 on which relief could be granted.

7           Let's start with the Sherman Act, Section 2, which  
8 alleges that defendants unlawfully maintained monopoly power.  
9 Section 2 of the Sherman Act makes it unlawful for any person  
10 to, quote, monopolize any part of the trade or commerce among  
11 the federal states or with foreign nations. 15 U.S. Code  
12 Section 2. Quote, to state a Section 2 claim of  
13 monopolization, a plaintiff must allege, one, the possession of  
14 monopoly power in the relevant market and, two, the willful  
15 acquisition or maintenance of that power as distinguished from  
16 growth or development as a consequence of a superior product,  
17 business acumen, or historic accident, unquote. *In re Keurig*  
18 *Green Mountain Single-Serve Coffee Antitrust Litigation*, 383 F.  
19 Supp. 3d 187 at 219, Southern District, 2019. See *In re Tether*  
20 *& Bitfinex Crypto Asset Litigation*, 576 F. Supp. 3d 55 at 94,  
21 Southern District, 2021.

22           Turning to the first prong, quote, a plaintiff must  
23 allege a relevant product market in which the anticompetitive  
24 effects of the challenged activity can be assessed, unquote.  
25 *In re Keurig* at 224 to 25. Quote, for purposes of Section 2,

1 the relevant market is the area of effective competition within  
2 which the defendant operates, unquote. *LLM Bar Exam v. Barbri*,  
3 271 F. Supp. 3d 547 at 582, Southern District, 2017, affirmed  
4 922 F.3d 136. A relevant product market consists of products  
5 that have reasonable interchangeability for the purposes for  
6 which they are produced, price, use, and qualities considered.  
7 Products are reasonably interchangeable if consumers treat them  
8 as acceptable substitutes. *LLM* at 582.

9 The, quote, outer boundaries, unquote, of the  
10 relevant market, quote, are determined by the reasonable  
11 interchangeability of use or the cross-elasticity of demand  
12 between the product itself and substitutes for it, unquote.  
13 *US Airways v. Sabre Holdings*, 938 F.3d 43 at 64. To define the  
14 relevant market, the Second Circuit often also applies the,  
15 quote, hypothetical monopolist test, unquote, or HMT, which  
16 asks, quote, whether a hypothetical monopolist asking within  
17 the proposed market would be substantially constrained from  
18 increasing prices by the ability of the customers to switch to  
19 other producers. *American Express*, 838 F.3d at 198.

20 Under this test, the market is, quote, any grouping  
21 of sales whose sellers, if unified by a hypothetical cartel or  
22 merger, could profitably raise prices significantly above the  
23 competitive level. *American Express* at 198 to 99. Quote, if  
24 the sales of other producers substantially constrain the  
25 price-increasing ability of the hypothetical cartel, those

1 others are part of the market. Same case at 199. While,  
2 quote, reasonable interchangeability sketches the boundaries of  
3 the market ... there may also be cognizable submarkets which  
4 themselves constitute the appropriate market for antitrust  
5 analysis, unquote. *Geneva Pharmaceuticals v. Barr Labs*, 386  
6 F.3d 485 at 496.

7           Quote, the boundaries of such a submarket may be  
8 determined by examining such practical indicia as industry or  
9 public recognition of the submarket as a separate economic  
10 entity, the product's peculiar characteristics and uses, unique  
11 production facilities, distinct customers, distinct prices,  
12 sensitivity to price changes, and specialized vendors, unquote.  
13 *Brown Shoe v. the United States*, 370 U.S. 294 at 325. Quote,  
14 the term "submarket" is somewhat of a misnomer since the  
15 submarket analysis simply clarifies whether the two products  
16 are, in fact, reasonable substitutes and therefore a part of  
17 the same market, unquote. *Geneva* at 496. The emphasis is  
18 always -- sorry. The emphasis always is on the actual dynamics  
19 of the market rather than rote application of any formula.  
20 Same case at 496.

21           Quote, where the plaintiff fails to define its  
22 proposed relevant market with reference to the rules of  
23 reasonable interchangeability and cross-elasticity of demand or  
24 alleges a proposed relevant market that clearly does not  
25 encompass all interchangeable substitute products even when all

1 factual inferences are granted in the plaintiff's favor, the  
2 relevant market is legally insufficient, and a motion to  
3 dismiss may be granted, unquote. *LLM* at 582. Quote, it is  
4 important to recognize that because market definition is a  
5 deeply fact intensive inquiry, courts hesitate to grant motions  
6 to dismiss for failure to plead a relevant product market,  
7 unquote. *Keurig* at 225.

8 Plaintiff alleges here that the relevant market is  
9 the Unix/Linux paid server operating system market. Complaint,  
10 paragraph 36. Defendants argue that this market fails under  
11 the *Brown Shoe* factors because it does not include facts  
12 supporting five of the six factors. See defendants motion to  
13 dismiss brief at 6 through 9. *Brown Shoe*, however, is not a  
14 checklist of required factors. Quote, the indicia in *Brown*  
15 *Shoe* are instructive in determining the existence of a  
16 submarket, but the presence of some and the absence of others  
17 is not dispositive, unquote. *Southeast Missouri Hospital v.*  
18 *C.R. Bard*, 642 F.3d 608 at 614, Eighth Circuit, 2011.

19 See *C.E. Services v. Control Data*, 759 F.2d 1241 at  
20 1246, a 1985 case where the Fifth Circuit said, quote, the  
21 existence of one or more of these *Brown Shoe* indices does not  
22 necessarily preclude a summary determination that certain  
23 products or services either are reasonably interchangeable or  
24 demonstrate a high cross-elasticity of demand, unquote. *IT&T*  
25 *v. General Telephone & Electric*, 518 F.2d 913 at 932, Ninth

1 Circuit, 1975, which said the presence or absence of *Brown Shoe*  
2 factors does not, quote, dispose in talismanic fashion of the  
3 submarket issue, unquote. *Overruled on other grounds*, 495 U.S.  
4 271, *California v. American Stores* and *Brown v. Amazon*, 2023  
5 Westlaw 5793303 at page 6, Western District of Washington,  
6 September 7, 2023. That said *Brown Shoes* practical indicia are  
7 not a litmus test, and courts have held that submarkets exist  
8 even when only some factors are present.

9           The ultimate test to define a relevant market is,  
10 quote, the reasonable interchangeability of use or the  
11 cross-elasticity of demand between the product itself and  
12 substitutes for it, unquote. *US Airways*, 938 F.3d at 64.  
13 Along these lines, defendant argues that other paid operating  
14 systems such as Windows Server and Mac OS X Server must be  
15 included in the relevant market, that plaintiff has failed to  
16 allege facts showing that free server operating systems are not  
17 reasonably interchangeable with paid systems, and that  
18 plaintiff has failed to allege facts that show that if the  
19 market is limited to enterprise customers, plaintiff sales to  
20 the lower end of the market can be in the relevant market while  
21 free server operating systems are not. That's in defendant's  
22 brief at pages 8 to 9.

23           I find that plaintiff has adequately alleged a  
24 relevant market. First, plaintiff has adequately alleged that  
25 users of the Unix/Linux paid server operating system market

1 understand Unix/Linux products to be reasonable potential  
2 substitutes for each other -- paragraph 39 -- and that other  
3 dissimilar operating system environments are not part of the  
4 relevant market because they are not interchangeable with  
5 Unix/Linux systems, and customers, therefore, do not view other  
6 operating systems as substitutes. Paragraphs 40 through 41.  
7 It is reasonable for customers to view as distinct products  
8 that run only on their servers.

9           See *Xerox v. Media*, 511 F. Supp. 2d 372 at 385,  
10 Southern District, 2007, a case in which plaintiff reasonably  
11 alleged that the relevant market from the perspective of owners  
12 of Xerox phase change color printers is composed only of  
13 consumables that are compatible with their printers.  
14 Furthermore, plaintiff has plausibly alleged that free server  
15 operating systems are not adequate substitutes because they are  
16 mainly used in testing and development and lack the business  
17 critical support and maintenance that corporate clients need.  
18 Paragraph 41.

19           Lastly, defendants seem to suggest that because  
20 plaintiff limits the relevant market to enterprise or large  
21 customer accounts, plaintiff sales to the low end of the market  
22 cannot be in the relevant market. No such limitation appears  
23 in the complaint's description of the relevant market.  
24 Paragraphs 36 to 41. Defendants does not -- do not explain why  
25 low-end customers which consist of small- and medium-sized

1 companies -- see paragraph 83 -- cannot be considered part of  
2 the paid Linux operating system market. Discovery may reveal  
3 the plaintiff's factual allegations regarding the market are  
4 incorrect, but at this early stage, in taking them as true as I  
5 must, they suffice.

6 Plaintiff must also allege that defendants possessed  
7 monopoly power in this relevant market, meaning, quote, the  
8 power to control prices or exclude competition in a given  
9 market which, unquote -- which, quote, can be pled directly  
10 through allegations of control over prices or the exclusion of  
11 competition or may be inferred from a defendant's large share  
12 of the relevant market, unquote. *In re Keurig* at 225.

13 Plaintiff has directly pleaded that IBM excluded  
14 competition by giving up its low-end customers only to Red  
15 Hat -- paragraph 85 -- giving preferential support to RHEL  
16 installed on IBM's servers -- paragraph 93 -- and reimbursing  
17 its server business partners to get certified to use Linux  
18 through Red Hat. Paragraph 96. Plaintiff further alleges that  
19 IBM and Red Hat excluded plaintiff by agreeing that Red Hat  
20 would adopt RHEL for IBM systems in a way that competitors  
21 could not achieve -- paragraph 121 -- and by insuring that  
22 plaintiff's systems are supported on the IBM cloud. Paragraph  
23 126. Plaintiff also alleges that customers are forced to pay  
24 higher prices because high-end customers face significant  
25 migration costs, and low-end customers are locked into their



1 investments in RHEL and that post-merger and even premerger to  
2 an extent defendants have significantly raised their prices.  
3 Paragraphs 151 to 52 and 165 to 67.

4 Defendants argue plaintiff has failed to allege  
5 direct evidence of market power because while plaintiff has  
6 alleged that IBM and Red Hat raised their prices, that is not  
7 evidence of market power and just evidence of how they priced  
8 their products in recent years. That's in their brief at page  
9 10. That may turn out to be the case, but at this stage I find  
10 the plaintiff's direct allegations are sufficient to plausibly  
11 suggest that defendant possesses market power, and because I so  
12 find, I need not consider the parties' arguments regarding  
13 indirect allegations of market power.

14 Plaintiff must also allege the willful acquisition or  
15 maintenance of monopoly power as distinguished from just having  
16 a better product, business acumen, or luck. *Keurig* at 229. As  
17 I've already explained, plaintiff alleges that IBM willfully  
18 partnered with Red Hat to shield itself from established and  
19 growing competitors. Paragraphs 75. To this end, it forsook  
20 its own interests by giving Red Hat more access to its clients  
21 and supporting Red Hat's operating system over its own, even  
22 providing rebates to server customers that purchased servers  
23 packaged with RHEL while not permitting any other competitors  
24 to run their operating systems on IBM's servers.  
25 Paragraphs 91, 95, 96, and 98.

1 Defendant argues in its reply at pages 5 to 6 that  
2 plaintiff fails to adequately allege this factor because each  
3 allegation of anticompetitive behavior alone is not actionable,  
4 and they cannot together make an antitrust claim. This  
5 argument fails because plaintiff has alleged at least one type  
6 of actionable conduct, a horizontal agreement to divide the  
7 market. Furthermore, antitrust cases are assessed by  
8 considering the conduct as a whole, and taking the alleged  
9 allegations together, I find that plaintiff has sufficiently  
10 alleged the willful acquisition or maintenance of market power  
11 at this stage.

12 See *U.S. against Apple*, 791, F.3d 290 at 319, which  
13 said, quote, in antitrust cases, the character and effect of a  
14 conspiracy are not to be judged by dismembering it and viewing  
15 its separate parts but only by looking at it as a whole,  
16 unquote. See also *U.S. against AT&T*, 524 F. Supp. 1336 at  
17 1344, District of Columbia, 1981, which cited a Supreme Court  
18 proposition -- Supreme Court cases for the proposition that,  
19 quote, otherwise innocent or ambiguous behavior may violate the  
20 Sherman Act when considered together with the remainder of the  
21 conduct, unquote. To the extent defendants argue that  
22 plaintiff's allegations are not specific enough, there's no  
23 heightened pleading standard in antitrust cases, and a  
24 plaintiff need only state a plausible claim. *Wacker versus JP*  
25 *Morgan Chase*, 678 F. App'x 27 at 29.

1 Defendants also argue that to the extent the alleged  
2 anticompetitive conduct centers on post-merger agreements, it  
3 is not actionable because a parent and subsidiary cannot  
4 conspire or make anticompetitive agreements, but the merger  
5 does not absolve IBM and Red Hat from anticompetitive conduct  
6 taken before the merger, and defendant's reliance on *Copperweld*  
7 *v. Independent Tube*, 467 U.S. 752, fails because there the  
8 Supreme Court held that a conspiracy between a parent and  
9 subsidiary was not legally possible under Section 1 of the  
10 Sherman Act, not that companies now merged could not be  
11 penalized for anticompetitive conduct before the merger or that  
12 merged companies could not be penalized for monopolization  
13 under Section 2 after the merger. See *Copperweld* at 767, Note  
14 13.

15 Lastly, defendant's argument that plaintiff was not  
16 harmed by the alleged market allocation because  
17 supracompetitive pricing would make plaintiff more attractive  
18 fails because plaintiff has plausibly explained the lock-in  
19 effect of the products on customers, which hinder customers'  
20 ability to switch to other competitive operating systems like  
21 plaintiff's.

22 At this stage, taking all of plaintiff's well pled  
23 allegations as true, I find plaintiffs have alleged facts  
24 sufficient to state a claim under Section 2.

25 Defendants also move to dismiss plaintiff's

1 allegations that defendants conspired to restrain trade in the  
2 relevant market in violation of Section 1 of the Sherman Act.  
3 As an initial matter, as with the Section 2 claim, a Section 1  
4 claim must define the relevant market, which I've already -- a  
5 requirement I've already found to be satisfied. See *New York*  
6 *Medscan v. NYU*, 430 F. Supp. 2d 140 at 145, Southern District,  
7 2006.

8           Section 1 of the Sherman Act prohibits restraints on  
9 trade effected by a contract combination or conspiracy. The  
10 critical question is whether the challenged anticompetitive  
11 conduct stems from independent decision or from agreement,  
12 tacit or expressed. To state a claim under Section 1 of the  
13 Sherman Act, the plaintiff must show a combination or some form  
14 of concerted action between at least two legally distinct  
15 economic entities that unreasonably restrains trade. *In re*  
16 *Tether and Bitfinex*, 576 F. Supp. 3d at 101.

17           With respect to the first element, to allege an  
18 unlawful agreement, plaintiff must assert either direct  
19 evidence of a conspiracy or circumstantial facts supporting an  
20 inference that a conspiracy existed. Conspiracies are rarely  
21 evidenced by explicit agreements and usually must be proven  
22 through inferences drawn from the behavior of the alleged  
23 conspirators. The line separating conspiracy from parallelism  
24 is indistinct but may be crossed with allegations of  
25 interdependent conduct accompanied by circumstantial evidence

1 and plus factors. Illustrative nonexhaustive plus factors  
2 include a common motive to conspire, evidence showing that the  
3 parallel acts were against the apparent individual economic  
4 self-interest of the alleged conspirators, and evidence of a  
5 high level of interfirm communications. At the motion to  
6 dismiss stage, a plaintiff must only provide sufficient factual  
7 matter to plausibly suggest an inference of conspiracy even if  
8 the facts are susceptible to an equally likely interpretation.  
9 All of that is from *In re Tether* at 101 through 102.

10           Quote, if a plaintiff establishes the existence of an  
11 illegal contract or combination, it must then proceed to  
12 demonstrate that the agreement constituted an unreasonable  
13 restraint of trade either per se or under the rule of reason,  
14 unquote. *In re Keurig* at 241. Conduct considered illegal per  
15 se is invoked where a defendant's actions are so plainly  
16 harmful to competition and so obviously lacking in any  
17 redeeming pro-competitive values that they are conclusively  
18 presumed illegal without further examination, but most  
19 antitrust claims are analyzed under rule of reason, according  
20 to which the finder of fact must decide whether the questioned  
21 practice imposes an unreasonable restraint on competition,  
22 taking into account a variety of factors, including specific  
23 information about the relevant business, its condition before  
24 and after the restraint was imposed, and the restraint's  
25 history, nature, and effect. *Keurig* at 241.

1           Agreements within the scope of Section 1 may be  
2 either horizontal, in other words, between competitors at the  
3 same level of the market structure, or vertical, in other  
4 words, combinations of persons at different levels of the  
5 market structure such as manufacturers and distributors.  
6 *American Express*, 838 F.3d at 194. Restraints imposed by  
7 agreement between competitors are traditionally called  
8 horizontal, and those by agreements between firms at different  
9 levels are called vertical. The same case at 194. Vertical  
10 restraints are generally judged under the rule of reason. Same  
11 case at 194. Restraints that are per se unlawful include  
12 horizontal agreements among competitors to fix prices or divide  
13 markets. *Leegin Creative*, 551 U.S. at 886.

14           Plaintiff has alleged that before the merger, IBM and  
15 Red Hat established an, quote, alliance, unquote, to divide the  
16 relevant market and restrain trade by suppressing competing  
17 operating systems and preventing plaintiff from competing for  
18 customers. Paragraphs 90 and 154. There are plain allegations  
19 of a horizontal agreement to divide markets, which is per se  
20 unlawful. Further, plaintiff has adequately alleged at least  
21 two of the three plus factors distinguishing parallel conduct  
22 from a conspiracy, a common motive to conspire, and evidence  
23 that parallel acts were against the apparent individual  
24 self-interest of the alleged conspirators. See paragraphs 78  
25 to 79 on the first and paragraphs 95, 97, 98, 100, and 110 on

1 the latter.

2 Defendant's arguments to the contrary are the same  
3 described within Section 2. Taking the acts separately,  
4 defendants argue that none of the conduct alleged is  
5 sufficient, but considering the conduct together, plaintiff has  
6 adequately alleged concerted action between IBM and Red Hat  
7 that unreasonably restrained trade and thus has stated a claim  
8 under Section 1.

9 Defendant also moves to dismiss plaintiff's claims  
10 under Section 7 of the Clayton Act, which, quote, prohibits the  
11 acquisition of a business's assets where the effect of such an  
12 acquisition is to substantially lessen competition, unquote.  
13 *St. Francis Hospital v. Hartford Healthcare*, 655 F. Supp. 3d 52  
14 at 78, District of Connecticut, 2023. Quote, one type of  
15 acquisition which is frequently challenged as a violation of  
16 Section 7 is the horizontal merger, unquote. *Remington v.*  
17 *North America Philips*, 717 F. Supp. 36 at 42, District of  
18 Connecticut, 1989. *On reconsideration* at 755 F. Supp. 52.

19 Quote, this type of merger involves the acquisition  
20 of the stocks or assets of one competitor by another. When  
21 analyzing a horizontal merger under Section 7, the court must  
22 describe the companies involved, analyze the product in the  
23 geographic market in which they compete, and explore the  
24 structure of the industry affected by the merger to ...  
25 properly assess the probable effects of the merger on

1 competition. *Remington* at 42. Quoting *Stanley v. FTC*, 469 F.2d  
2 498 at 499. When evaluating, quote, the likely competitive  
3 effects of a prospective business merger ... the court weighs  
4 what actions taken by the parties to the merger and other  
5 proponents could substantially influence consumer choices and  
6 thus affect competition and product pricing in the relevant  
7 markets, unquote. *New York v. Deutsche Telekom*, 439 F. Supp.  
8 3d 179 at 188, Southern District, 2020.

9 In *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, the Second  
10 Circuit listed, quote, several factual considerations relative  
11 to predicting the probable effects of a merger, including ...  
12 the nature and economic purpose of the arrangement, the  
13 likelihood and size of any market foreclosure, the extent of  
14 concentration of sellers and buyers in the industry, the  
15 capital cost required to enter the market, the degree of market  
16 power possessed by the merged enterprise, the number and  
17 strength of competing suppliers and purchasers, and the  
18 existence of a trend towards vertical concentration or  
19 oligopoly in the industry, unquote. *In re Zinc Antitrust*  
20 *Litigation*, 2016 Westlaw 3167192 at page 23, Southern District,  
21 June 6, 2016.

22 Quote, as is the case with the claim brought under  
23 Section 2 of the Sherman Act, a Section 7 claim requires that  
24 the plaintiff allege a plausible relevant market in which  
25 competition will be impaired, unquote. *Zinc* at 22.



1 I find that plaintiff has met this requirement for  
2 the reasons already discussed. As for the likely  
3 anticompetitive effects, I find that plaintiff's allegations  
4 are sufficient at this stage considering the relevant factors.

5 Regarding the nature and economic purpose of the  
6 merger, plaintiff alleges that it was to continue the premerger  
7 anticompetitive conduct, raised prices even more, and reduced  
8 consumer choice. In *U.S. v. E. I. du Pont*, 353 U.S. 586 at  
9 607, the court explained that, quote, the test of a violation  
10 of Section 7 is whether at the time of the suit there is a  
11 reasonable probability that the acquisition is likely to result  
12 in the condemned restraints, unquote. Plaintiff has plausibly  
13 described the price increases, choice decreases, concentration  
14 of market power, and the weakening of competition as a result  
15 of the merger.

16 Specifically, plaintiff alleges that within three  
17 months of the merger, IBM announced increases in purchase  
18 prices up to 39 percent for the AIX for Power operating system.  
19 Paragraph 166. Plaintiff also alleges that since the merger,  
20 IBM has dramatically increased prices across the board on over  
21 5,000 of its on-premise server software products, including the  
22 AIX operating system, by removing prior volume discounts on  
23 support and service fees for the millions of existing IBM  
24 customers that had discounts. Paragraph 167.

25 Plaintiffs further allege in the same paragraph that

1 IBM increased service and maintenance fees by around  
2 10 percent, meaning that every year customers now pay  
3 approximately 20 percent of the list price. Plaintiffs further  
4 allege that since the merger, IBM eliminated a free version of  
5 Red Hat Linux called CentOS, reducing consumer choice.  
6 Paragraph 164 and 168. And plaintiff further alleges that,  
7 quote, most recently, unquote, which -- construing the facts in  
8 the light most favorable to plaintiff I construe as referring  
9 to a time post-merger, quote, IBM and Red Hat have constructed  
10 the IBM cloud such that XinuOS's OpenServer 10 based on open  
11 source FreeBSD Unix is substantially excluded from working as  
12 efficiently or effectively, unquote. Paragraph 125.

13 Plaintiff also alleges that, quote, contrary to  
14 spurring more innovation after the merger, capital expenditure  
15 outlays declined by 25 percent, unquote, when companies usually  
16 report an increase in such expenditures following a major  
17 business combination. Paragraph 168. The complaint also  
18 describes a high degree of market power and high capital costs  
19 to enter the market, alleging that, quote, the agreements  
20 between Red Hat and IBM have caused the two companies to  
21 sufficiently scale and have sufficient control in the market  
22 and to make it economically unfeasible for new companies to  
23 enter the market, unquote, and that they are still benefiting  
24 from these anticompetitive acts post-merger. Paragraph 169.

25 Plaintiff further alleges that the merger has

1 eliminated actual and potential competition in the market --  
2 paragraph 206 -- and that there is an ongoing threat that IBM  
3 and Red Hat will be able to increase the prices of RHEL, AIX  
4 for Power, z/OS mainframe, and i midrange server operating  
5 systems and provide lower quality products through their  
6 combination and in view of very high switching costs and  
7 customer lock-in. Paragraph 168. At this stage, these  
8 allegations suffice to plausibly allege anticompetitive effects  
9 of the merger.

10 Plaintiff suggests -- excuse me. Defendants -- one  
11 more try. Defendants suggest that plaintiff's claim is  
12 weakened because the U.S. Department of Justice and the  
13 European Commission reviewed the transaction and did not take  
14 issue with it, but defendant presents no authority suggesting  
15 that regulatory approval per se precludes a viable Section 7  
16 claim. It may well turn out that the reasons the regulators  
17 approved the merger will make it impossible for plaintiff to  
18 prove its case, but the approval itself is not a ground for  
19 dismissal of an otherwise plausible claim. So the Section 7  
20 claim survives.

21 Defendants also move to dismiss plaintiff's claim  
22 that defendant violated the Virgin Islands Antimonopoly Law,  
23 which is found in the Virgin Islands Statutes Title 11 at  
24 Section 1501 *et seq.* For this claim, plaintiff alleges that  
25 defendants conspired to restrain trade and gain monopoly power.

1 See paragraphs 212 and 213. Defendants argue that insofar as  
2 the federal monopolization claim fails, the corresponding  
3 Virgin Islands claim fails as well.

4 The Virgin Islands Antimonopoly Law is generally  
5 interpreted in accordance with federal antitrust law. See, for  
6 example, *Sea Air Shuttle Corp. v. Virgin Islands Port*  
7 *Authority*, 782 F.Supp. 1070 at 1077, D.V.I. 1991. See also  
8 *Xinuos v. IBM and Red Hat*, 2022 Westlaw 16921760 at page 12.  
9 From this case D.V.I, November 14, 2022, *Yearwood Enterprise*  
10 *against Antilles Gas*, 2017 Westlaw 2709831 at page 3, Virgin  
11 Islands Superior Court, June 21, 2017.

12 Because I found the federal monopolization claim  
13 survives, so does the Virgin Islands claim.

14 Turning now to the Virgin Islands common law unfair  
15 competition claim. Quote, the antimonopoly law also covers ...  
16 unfair competition, unquote. *Mamouzette v. Jerome*, 2022  
17 Westlaw 1026868 at page 5, D.V.I April 5, 2022. And the unfair  
18 competition claim should, quote, follow the construction given  
19 to similar federal antitrust law provisions. That's a quote  
20 from this case, *Xinuos*, 2022 Westlaw 16921760 from the Virgin  
21 Islands at page 12. Defendants argue only that if plaintiff's  
22 claim is insufficient under the Virgin Islands Antimonopoly  
23 Law, it cannot be restated as one for unfair competition and  
24 that that is the claim here because the federal claims are  
25 deficient. That's in defendant's brief at 24.

1           Because I found neither the federal nor the Virgin  
2 Islands Antimonopoly claims to be deficient, this precise  
3 argument fails, but the larger point remains. The case  
4 defendants cite *Gardiner versus Saint Croix*, 2019 Westlaw  
5 3814427 at page 7, Virgin Islands Superior Court, July 30,  
6 2019. It seems to say that a claim for unfair competition  
7 should be dismissed where it merely restates an antitrust  
8 claim. That is the case here. Indeed, plaintiff concedes that  
9 the Virgin Islands have not developed a common law unfair  
10 competition claim. See plaintiff's opposition brief ECF 125 at  
11 page 22.

12           The district court in the Virgin Islands in this case  
13 indicated the same, that unfair competition claims fall under  
14 the antimonopoly statute in its decision transferring the case  
15 to this court. See ECF Number 75 at pages 20 to 21.

16           Because plaintiff attempts to bring the common law  
17 unfair competition claim and such a claim, if it exists at all,  
18 is duplicative of the Virgin Islands statutory claim, it is  
19 dismissed.

20           Turning now to Virgin Islands common law unjust  
21 enrichment. First, because this is a diversity action, I apply  
22 the choice-of-law principles of New York. See, for example,  
23 *AEI v. Lincoln Benefit*, 892 F.3d 126 at 132. In New York  
24 courts dispense with choice of law and apply New York law if  
25 it's among the relevant choices and there's no actual conflict,

1 meaning that any differences in the relevant substantive rules  
2 from each jurisdiction will not have a significant possible  
3 effect on the outcome. See *Valenzuela v. Putnam County*, 2020  
4 Westlaw 5370195 at page 5, Southern District, September 8,  
5 2020. Here the law governing unjust enrichment in New York and  
6 the Virgin Islands does not appear to conflict. See *Walters v.*  
7 *Walters*, 60 Virgin Islands Supreme Court 768 at 779 to 80 and  
8 *Cooper v. Anheuser-Busch*, 553 F. Supp. 3d 83 at 1150, Southern  
9 District, 2021.

10 So I will apply New York law to the unjust enrichment  
11 claim. See *Lomax v. Aegis Funding*, 2010 Westlaw 1633440 at  
12 page 3, Eastern District, April 19, 2010. The basic elements  
13 of an unjust enrichment claim in New York would require proof  
14 that the defendant was enriched at the plaintiff's expense, and  
15 equity and good conscience militate against permitting  
16 defendant to retain that which the plaintiff is seeking to  
17 recover. *Cooper* at 115. But New York's highest court has made  
18 clear that unjust enrichment is not a catchall cause of action  
19 to be used when others fail, and an unjust enrichment claim is  
20 not available where it simply duplicates or replaces a  
21 conventional contract or tort claim. *Cooper* at 115.

22 Defendants argue plaintiff's claim must be dismissed  
23 because unjust enrichment is an equitable remedy that is  
24 unavailable, whereas here a legal remedy exists. Plaintiff  
25 does not dispute this but argues it's allowed to plead an

1 equitable claim in the alternative, but I disagree because even  
2 pleaded in the alternative, claims for unjust enrichment will  
3 not survive a motion to dismiss where plaintiffs fail to  
4 explain how their unjust enrichment claim is not merely  
5 duplicative of their other causes of action. *Bermudez v.*  
6 *Colgate-Palmolive*, 2022 Westlaw 2751044 at page 15, Southern  
7 District, March 31, 2023. Virgin Islands courts appear to  
8 apply the same rule. See *Matthews v. R&M*, 2020 Westlaw 1650825  
9 at page 6, Virgin Islands Superior Court, 2020, and *Pourzal v.*  
10 *Marriott*, 2006 Westlaw 2471695 at page 3, D.V.I. August 17,  
11 2006.

12 Plaintiffs unjust enrichment claims here rely on the  
13 same set of facts as its other claims, and accordingly the  
14 unjust enrichment claim is dismissed.

15 Finally, as to leave to amend, it should be freely  
16 given when justice so requires under Rule 15, but it's within  
17 the sound discretion of the Court to grant or deny leave to  
18 amend. *Kim v. Kimm*, 884 F.3d 98 at 105. Though liberally  
19 granted, leave may properly be denied for repeated failure to  
20 cure deficiencies by amendments previously allowed or futility  
21 of amendment among other reasons. *Ruotolo v. City of New York*,  
22 514 F.3d 184 at 191.

23 At the end of its motion to dismiss the opposition  
24 brief, plaintiff says that if the Court concludes it's failed  
25 to plead any of the challenged claims in the complaint, it can

1 replead. Plaintiff has not suggested that it is in possession  
2 of facts that would cure the deficiencies in the unfair  
3 competition for unjust enrichment claims, and accordingly I  
4 decline to grant leave to amend. See *TechnoMarine v.*  
5 *Giftports*, 758 F.3d 493 at 505, and *Gallop v. Cheney* at 642  
6 F.3d 364 at 369, which said that plaintiff doesn't have to be  
7 given leave if it fails to specify how an amendment would lead  
8 to a different result. Indeed, here the problems with those  
9 two claims are substantive, and it does not appear that a  
10 better pleading could cure them. See *Cuoco v. Moritsugu*, 222  
11 F.3d 99 at 112 and *Boswell v. Bimbo Bakeries* at 570 F. Supp. 3d  
12 89 at 97, Southern District, 2021.

13 So to conclude, the motion for summary judgment on  
14 the copyright claim is granted. The motion to dismiss is  
15 denied as to the Sherman Act, Section 2, Sherman Act, Section  
16 1, and the Clayton Act, Section 7, and the Virgin Islands  
17 Antimonopoly Law claim, and it's granted as to the Virgin  
18 Islands unfair competition and unjust enrichment claims.

19 I'm going to refer you folks to the magistrate judge  
20 for discovery. We also need to set a date for an answer.

21 Mr. Marriott, when will you be able to answer?

22 MR. MARRIOTT: If we could have 30 days. I suppose  
23 that would be ideal, your Honor.

24 THE COURT: All right. That will take us to  
25 February 21. Let's see. Who's your magistrate judge? It



1 looks like maybe they dropped the ball when they sent this case  
2 up here from Manhattan. It looks like it was originally  
3 assigned to District Judge Oetken and Magistrate Judge Aaron.  
4 One of them woke up and decided it should land on my lap, but  
5 I'm not seeing what magistrate judge was designated. So I'll  
6 have the clerk's office do that, and you can be in suspense  
7 unless I missed it.

8 THE DEPUTY CLERK: Judge, it was -- May 30. There  
9 was a notice of designation.

10 THE COURT: I missed it. Move on. May 30. Oh,  
11 there it was. May 30. Judge Reznik. You'll really like  
12 working with her. She's great. Let's go off the record a  
13 second.

14 (Discussion off record)

15 THE COURT: Back on the record. I can't remember if  
16 I said this on the record already or not, but I'm going to  
17 refer to Judge Reznik for general pretrial supervision. I've  
18 encouraged the parties -- I've encouraged the plaintiff to  
19 commence some conversations about a possible business solution  
20 at this juncture, and it is certainly my philosophy and I would  
21 be surprised if it wasn't Judge Reznik's that if you're really  
22 getting somewhere on a resolution, it makes more sense to put  
23 the resources into that than into discovery.

24 So I wouldn't say, oh, let's pause the discovery the  
25 first time you pick up the phone, but if you really think you

1 might be getting somewhere and you're making good progress and  
2 you want to pause the discovery, I'm amenable to that, and I  
3 imagine Judge Reznik would be as well.

4 Anything else we should do this morning?

5 MR. SUPKO: Not from plaintiffs perspective, your  
6 Honor.

7 MR. MARRIOTT: Not here either, your Honor. Thank  
8 you.

9 THE COURT: Thank you all. Everybody stay well.

10 (Proceedings concluded)

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